

# Journal of Civil Rights and Economic Development

---

Volume 19  
Issue 1 *Volume 19, Fall 2004, Issue 1*

Article 4

---

October 2004

## Immigration Policy and International Students: A Threat to National Security

Victor C. Johnson

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

---

### Recommended Citation

Johnson, Victor C. (2004) "Immigration Policy and International Students: A Threat to National Security," *Journal of Civil Rights and Economic Development*. Vol. 19 : Iss. 1 , Article 4.  
Available at: <https://scholarship.law.stjohns.edu/jcred/vol19/iss1/4>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# IMMIGRATION POLICY AND INTERNATIONAL STUDENTS: A THREAT TO NATIONAL SECURITY

VICTOR C. JOHNSON\*

The horrific events of September 11, 2001, changed many things, but they didn't repeal the law of unintended consequences. There is today a clear and present danger that some of the well intentioned actions that the United States is taking in response to those events will make it more difficult, not less, to build a safer world.

Nowhere is that clearer than in the field of student and scholarly exchanges. The federal government is beginning, however unintentionally, to dismantle an industry that we spent 50 years establishing in the conviction that the presence of international students and scholars serves the national interest. If things continue as they are, we may wake up in a few years and realize that our country has done lasting damage to this investment in foreign policy.<sup>1</sup>

Those words of mine appeared last April 11 in an opinion piece in *The Chronicle of Higher Education*. Regrettably, it is a statement that has stood the test of time.

We have been successful at changing the nature of the debate on international students since the immediate aftermath of 9/11. Political leaders and editorialists now routinely recognize the importance of international students to our country.<sup>2</sup> But day-to-

\* Associate Executive Director, Public Policy NAFSA: Association of International Educators. These remarks are an actual transcript of the author's comments at the St. John's Journal of Legal Commentary Symposium on Feb. 27, 2004.

<sup>1</sup> Victor Johnson, *When We Hinder Foreign Students and Scholars, We Endanger Our National Security*, CHRON. OF HIGHER EDUC., April 11, 2003, at 7.

<sup>2</sup> See, e.g., Philip G. Altbach, *In Race for International Students, US Erects Hurdles and Loses Out*, CHRISTIAN SCI. MONITOR, March 16, 2004, at 9 (arguing for "a change in government policy to ensure the continued flow of foreign students" who are important part of U.S. academia and economy).

day practice, decision-making on the ground, often by the employees of the very people giving the nice speeches, continues to thwart students and scholars who seek to come here and to paint America with an unwelcoming face.

I cited three problems in the *Chronicle* article, and I will again address them here. First, there is the problem-plagued international student monitoring system; second, overzealous enforcement; and third, an inefficient visa system.

The United States monitors international students, scholars, and exchange visitors more extensively than any other non-immigrants outside the penal system.<sup>3</sup> This highly publicized monitoring system, unique to the United States, for which the students have to pay, has done nothing to enhance the reputation of the United States as a welcoming country in which to study.<sup>4</sup> And there is no question that SEVIS has been, and continues to be, problem-plagued and, as such, has been a huge and expensive burden on colleges and universities.<sup>5</sup> But our worst fears have not been realized because the Department of Homeland Security ("DHS") has been conscientious in working around the problems in the system.

Thousands of students experienced problems at ports of entry last fall because, for some reason beyond their control, they were not in SEVIS. Anticipating this problem, DHS had set up a quick-response capability that enabled inspectors to resolve these cases on the spot. As a result, in 97 percent of these cases, the student was admitted to the United States and was able to enroll in school.<sup>6</sup> Without the quick-response team, these students

<sup>3</sup> See *Foreign Students Boost National Security; Keeping Our Universities Open to the World Is Vital to Winning Hearts and Minds*, PITTSBURGH POST-GAZETTE, Jan. 9, 2002, at A11 (noting irrational United States focus on international students above all other immigrant categories).

<sup>4</sup> See Margarita Bauza, *Colleges Court Foreign Students; Officials Fear Terror Crackdown May Hurt Enrollment; MSU Takes Friendlier Stand*, DETROIT NEWS, Aug. 11, 2003, at 1C (noting wariness of some foreign students in coming to study in the United States post-SEVIS).

<sup>5</sup> See Marcella Bombardieri, *Colleges Fault System to Track Foreign Students Stymied in Efforts to File Data with INS*, BOSTON GLOBE, Jan. 30, 2003, at A1 (observing flaws in SEVIS have proved difficult for colleges and universities to deal with).

<sup>6</sup> See generally Alice Thomas, *Reports on Foreign Students are Due from Colleges Today; Tracking Part of Homeland Security Effort*, COLUMBUS DISPATCH (Ohio), Aug. 1, 2003, at 5B (reporting system set up by DHS, including stationing agents at major airports and establishing call center, to deal with potential SEVIS problems and ensure students were not wrongly denied access to U.S.).

would likely have been sent back home. We appreciate DHS's responsible approach to this problem.

But in this business, there is always another shoe that is ready to drop. The next SEVIS-related problem, which will reinforce the negative impressions of international students who want to study here concerns the fee that they will have to pay to finance the system.<sup>7</sup> The government refuses to meet its obligation to make the fee easy to pay. A final rule is due out in May that will require payment online with a credit card, or by mail with a U.S. dollar check, before the student can obtain a visa.<sup>8</sup> For students in many parts of the world, those are not easy options. They will join the growing ranks of those who are finding it too much of a hassle to get into this country.<sup>9</sup>

The second problem is overzealous enforcement. Again, DHS leadership has been able to mitigate the worst effects of the problems we were experiencing a year ago. The call-in re-registration portion of the special registration program was rescinded<sup>10</sup> before we had to again face the chilling scenes of Arab and Muslim males lined up outside of immigration offices wondering if they would emerge once they got in. Students were among the thousands detained a year ago under special registration.<sup>11</sup> Now, mercifully, this will not be an annual spectacle; but the damage was done.

Another enforcement problem concerns what happens to people who are in technical, administrative, or inadvertent violation of

<sup>7</sup> See George Lardner Jr., *Views Differ on System for Tracking Foreign Students*, WASH. POST, Apr. 3, 2003, at A08 (noting potential problems will be raised by the fee collection process).

<sup>8</sup> See Michelle Simakis, *Studies in the United States; Foreign Students Beset by Red Tape*, COLUMBUS DISPATCH (Ohio), Dec. 22, 2003, at 1A (describing proposed application fee system as requiring internet payment by credit card or by mailing check to the United States).

<sup>9</sup> See generally John Sutherland, *Real Lives: Nowhere Has Post-9/11 Paranoia Struck More Deeply Than in American Universities. Just Ask Ali*, GUARDIAN (London), Sept. 1, 2003, at 5 (implying that all the problems associated with SEVIS will impact the number of foreign students willing or able to come to study in the United States).

<sup>10</sup> See *Some Special Registration Requirements Ended, But Program Continues*, IMMIGRANTS' RIGHTS UPDATE (Nat'l Immig. L. Ctr., L.A., Cal.), Dec. 18, 2003, available at <http://www.nilc.org/immilawpolicy/arrestdet/ad076.htm> (discussing December 2003 changes to Department of Homeland Security special registration program affecting certain non-immigrant visitors to the U.S.).

<sup>11</sup> See generally Diana Jean Schemo, *Electronic Tracking System Monitors Foreign Students*, N.Y. TIMES, Feb. 17, 2003, at A11 (explaining government efforts to track foreign students using SEVIS and subsequent detention of students).

SEVIS.<sup>12</sup> It is very easy to be in that situation. The system is ridden with glitches; schools have a hard time keeping up with myriad reporting deadlines; the requirements are complex; and nineteen year olds tend to have a fairly easygoing attitude toward requirements like this. According to DHS, there were 25,000 such violations during SEVIS's first year.<sup>13</sup>

In some of those cases, enforcement officers showed up at a student's door at dawn, handcuffed her, and hauled her off to jail for a crime such as dropping a course without permission. Fortunately, these have been isolated cases. DHS has gone out of its way to install fail-safe mechanisms to override the system.<sup>14</sup> This is a noble attempt to make a system, which makes no sense, make sense. But more work is needed. We need to get to the point where detention is not an option for administrative, technical, or inadvertent violations.

This is a serious problem. Before 9/11, people were not used to associating the term "arbitrary detention" with the United States.<sup>15</sup> Now they do make this association, and it cannot help but play on their incentives to come here. We hear over and over again about students who had wanted to study here but ultimately chose another country because they felt more welcome and less at risk.<sup>16</sup>

<sup>12</sup> *Id.* (describing the potential for SEVIS compliance mistakes and their impact on students).

<sup>13</sup> See generally *House Science Committee Reviews Impact of Visas Mantis Procedures*, WASH. UPDATE (Am. Immig. L. Ass'n, D.C.), Mar. 3, 2004, at 4-5, available at <http://www.bcis/images/wash-update.pdf> (reporting Under Secretary for Border and Transportation Security Asa Hutchinson's admission before the House Science Committee that of 25,000 SEVIS violations reported by participating institutions, only 1,000 were actionable).

<sup>14</sup> See generally *The Conflict Between Science and Security in Visa Policy: Status and Next Steps: Hearing Before the House Comm. on Science*, 108th Cong. (Feb. 25, 2004) (statement of Asa Hutchinson, Under Secretary for Border and Transportation Security, Dep't of Homeland Security), available at <http://www.house.gov/science/hearings/full04/feb25/hutchin.htm> (reporting on status and improvements in functionality of SEVIS in response to committee members' concerns about technical difficulties experienced by system users).

<sup>15</sup> See generally William J. Aceves, *Arbitrary Detention in the United States and United Kingdom: Some Post-9/11 Developments*, ACLU INT'L CIV. LIBERTIES REP. (ACLU, N.Y., N.Y.), 2003, at 1-4, available at [http://www.sdshh.com/ICLR/ICLR\\_2003\\_3\\_Aceves.pdf](http://www.sdshh.com/ICLR/ICLR_2003_3_Aceves.pdf) (explaining that although prohibition against arbitrary detention is considered a core feature of the U.S. Constitution, the U.S.A. Patriot Act authorizes the indefinite detention of certain aliens).

<sup>16</sup> See generally Susan Taylor Martin, *Foreign Students' Toughest Test: Getting In*, ST. PETERSBURG TIMES (Fla.), Feb. 15, 2004, at 1A (describing the impact of visa restrictions and SEVIS on students wishing to study in the United States).

According to *The Washington Post*, there is talk of adding so-called "student visa violators" to the National Crime Information Center database.<sup>17</sup> Would you go study in another country if you knew that you could end up in a criminal database, one that includes convicted sex offenders and violent gang members, for the rest of your life, due to an innocent mistake or a technical infraction? I cannot think of a quicker way to halt educational exchange in its tracks.

Let me finish with our biggest problem: the visa system. The Department of State, the agency that issues visas, has been under severe attack since 9/11 for granting visas to the terrorists.<sup>18</sup> As a result, the State Department has not had the political space to be able to exercise reason and discretion to get around visa problems the way that DHS has done with respect to SEVIS and enforcement. Secretary of State Powell understands the importance of educational exchange very well,<sup>19</sup> but he has bigger battles to wage, and it seems clear that he has decided not to spend a chit trying to construct a rational visa policy. In this situation, the State Department cannot be viewed as doing anything that would open it to the charge that it is creating loopholes for terrorists. The result is a visa system that simply does not work.

People do not like being fingerprinted. They do not like what they perceive and refer to as "being treated like criminals."<sup>20</sup> They do not like to wait for weeks or even months for a personal visa interview and then travel long distances for it, especially if they only plan a short visit.<sup>21</sup> They do not like to see their visa

<sup>17</sup> See Dan Eggen, *U.S. Considers Expanding FBI Database; Names of Noncriminal Deportees and Student Visa Violators Would Be Added*, WASH. POST, Dec. 17, 2003, at A12 (reporting on Department of Homeland Security proposal to add the names of foreign students who violate their visas to the National Crime Information Center database).

<sup>18</sup> See generally Dan Eggen, *9/11 Panel Faults U.S. For Letting Hijackers In*, WASH. POST, Jan. 27, 2004, at A1 (describing criticism of United States officials for missing opportunities to stop foreigners who hijacked airplanes on September 11th from entering the United States).

<sup>19</sup> See Statement from Colin L. Powell, Secretary of State, Statement on International Education Week 2003, ¶ 5 (Nov. 12, 2003), at <http://exchanges.state.gov/view/statements/powell.htm> ("[I] encourage Americans of all ages and from all walks of life to consider participating in an exchange or an international education program.").

<sup>20</sup> See Simon A. Cole, *Lessons From the Past for the Genetic Future*, 67 BROOK. L. REV. 101, 109 (2001) (noting that a "criminal stigma" is attached to fingerprinting).

<sup>21</sup> See Joseph Spanier, Note, *The Legal Immigration Family Equity Act and Immigration and Naturalization Service Implementation*, 4 J. L. FAM. STUD. 363, 369 (2002) (discussing the length of time that is necessary to obtain a visa).

applications languish for months in Washington just because they happen to be Muslim or scientists.<sup>22</sup> And they do not like the arbitrary nature of the system. Consequently, they are voting with their feet. A survey that our colleague associations and our organization did last fall suggests that international student enrollments at U.S. colleges and universities are, at best, leveling off.<sup>23</sup> For certain important parts of the world, including China and the Islamic countries, they are falling fast.<sup>24</sup> Next year we may actually see an unprecedented decline in enrollments. At the graduate level, according to another survey that we released on Wednesday, February 25, 2004, international graduate student applications for this coming fall are way down compared with last fall.<sup>25</sup>

We desperately need what we do not have: a visa policy, which maximizes national security by focusing not only on keeping objectionable individuals out, but also on letting legitimate individuals in. Under the Homeland Security Act, DHS acquired responsibility for visa policy.<sup>26</sup> It is a responsibility that cries out to be exercised because the State Department is too vulnerable to solve this problem on its own. You have our recommendations in your packets. We look forward to working with DHS to implement them.

<sup>22</sup> See Neil A. Lewis and Christopher Marquis, *Longer Visa Waits for Arabs; Stir Over U.S. Eavesdropping*, N.Y. TIMES, Nov. 10, 2001, at A1 (stating that "[t]he State Department would slow the process for granting visas to young men from Arab and Muslim nations in an effort to prevent terrorist attacks.").

<sup>23</sup> See Associated Press, *International Student Enrollment Slows in U.S.* (Nov. 3, 2003), available at <http://www.cnn.com/2003/EDUCATION/11/03/foreign.students.ap/> (noting that the number of foreign students attending U.S. colleges possessed the lowest growth rate in seven years for the 2002-2003 school term); see also Press Release, International Institute of Education, *Foreign Student Enrollment Growth Slows in Fall 2003, According to IIE Survey* (Nov. 3, 2003), available at <http://opendoors.iienetwork.org/?p=36525> (stating the survey conducted by the Institute of International Education in 2003 and concluding that new security procedures and economic factors had a noticeable impact on foreign student enrollments).

<sup>24</sup> See Press Release, *supra* note 23 (noting a decline in enrollments from countries with large Islamic populations, including China). See generally Associated Press, *supra* note 23 (stating that the number of Chinese students enrolling in British institutions rose by over 36 percent).

<sup>25</sup> See Press Release, NAFSA: Association of International Educators, *Fewer International Graduate Students Applying to Study in the United States*, available at <http://www.nafsa.org/content/PublicPolicy/FortheMedia/appsjtsurvey.pdf> (last visited Mar. 22, 2004) (noting a decline in international graduate student applications).

<sup>26</sup> See Press Release, The White House: Office of the Press Secretary, *Fact Sheet on Increasing Immigration Safeguards and Improving Vital Information Sharing* (Oct. 29, 2001), available at <http://www.whitehouse.gov/news/releases/2001/10/20011029-13.html> (stating that the DHS was directed to thoroughly review student visa policies).

The bottom line is that despite the best intentions of DHS to manage the SEVIS problems and the enforcement problems, we appear to be witnessing the beginning of a shift in the attitudes of people around the world towards studying and researching in the United States. This does not auger well for the future of American world leadership or for our national security. For 50 years, everyone wanted to come here. Now we continually hear that people are turned off by the process of getting here.

The situation is not good. As deputy secretary of state Richard Armitage conceded in an interview with CNN last month, the pendulum has swung way too far in the direction towards making people feel unwelcome.<sup>27</sup> We have to go beyond congratulating ourselves on fixing each particular SEVIS problem. As a matter of national policy, we must recognize that international students are part of the solution to terrorism, not part of the problem, and act to restore the reputation of the United States as the primary destination for international students.

<sup>27</sup> See Interview by CNN with Richard L. Armitage, Deputy Secretary of State, United States of America, Beijing, China (Jan. 30, 2004), *available at* <http://www.state.gov/s/d/rm/28615.htm>, at ¶ 17 ("[A]fter 9/11 the United States, reeling from that hard attack, started exporting something that is not typically American, and that is we started exporting our fear and our anger instead of our optimism and our hope and our sort of welcoming nature. That pendulum, I believe, swung way too far one way and we are working rigorously to get it to swing back.").



